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No. 94-1867

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

AMERICAN LIFE LEAGUE, INC., et al.,

*Petitioners,*

—v.—

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES, et al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF IN OPPOSITION OF RESPONDENTS NATIONAL ABORTION FEDERATION; NATIONAL ORGANIZATION FOR WOMEN; COMMONWEALTH WOMEN'S CLINIC; CAPITOL WOMEN'S CENTER, INC.; GEORGE TILLER, DOCTOR; SUSAN WICKLUND, DOCTOR

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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether Congress had authority under the Commerce Clause or Section 5 of the Fourteenth Amendment to enact the Freedom of Access to Clinic Entrances Act.

2. Whether the Freedom of Access to Clinic Entrances Act is an unconstitutional content or viewpoint based restriction on speech.

3. Whether the Freedom of Access to Clinic Entrances Act is unconstitutionally vague or overbroad.

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## STATEMENT OF THE CASE

### A. Proceedings Below.

Petitioners American Life League, et al. (hereinafter "ALL"), filed this facial challenge to the Freedom of Access to Clinic Entrances Act ("FACE" or "the Act"), 18 U.S.C. § 248 et seq., on May 26, 1994, the day FACE became effective. On June 1, 1994, Respondents National Abortion Federation, the National Organization for Women, Commonwealth Clinic, Capitol Women's Clinic, Dr. George Tiller and Dr. Susan Wicklund (hereinafter "Respondents") moved to intervene as defendants; the court granted the intervention motion on June 3. Pet. App. A25. On June 16, the district court granted Respondent Reno's motion to dismiss. Pet. App. A25-A37. The court of appeals affirmed on February 13, 1995. Pet. App. A1-A24.

### B. The Factual Record Of Harm To Respondents.

Respondents moved to intervene because they will be severely harmed if FACE is enjoined or held unconstitutional. The National Abortion Federation ("NAF") is a professional organization of physicians, nurses, counselors, clinic administrators and other medical professionals who provide women across the country with reproductive health services. Virulent anti-abortion zealots routinely target their attacks on many NAF members. Individual NAF members are regularly stalked and threatened, and many NAF clinics have been bombed and

blockaded. See Shaw Decl. ¶ 3.[1] In March 1993, a physician working at a NAF clinic, Dr. David Gunn, was brutally murdered by an anti-abortion militant. Id. ¶ 5. Other NAF members have received numerous death threats. Id. ¶ 6.

The National Organization for Women ("NOW"), is a membership organization devoted to securing equal rights for women, including access to reproductive health care. Its over 200,000 members throughout the country include many individuals who use and will use reproductive health services. NOW has been a plaintiff in many cases seeking remedies against anti-choice extremism. E.g., National Organization for Women v. Scheidler, 114 S. Ct. 798 (1994); Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993); New York State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988); and 704 F. Supp. 1247 (S.D.N.Y.), appeals consolidated & aff'd as modified, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990).

Respondents Commonwealth Women's Clinic ("Commonwealth") in Falls Church, Virginia, and the Capitol Women's Center ("Capitol") in Washington, D.C., are two clinics that provide a range of reproductive health services, including abortions. Codding Aff. ¶ 1. Commonwealth and Capitol clinics have been the targets of various forms of intimidation, harassment, blockades and violence, the perpetrators of which would be subject to prosecution or civil injunctive and monetary relief under FACE. In particular, anti-abortion extremists have "rendered impassable" the entrances and exits to all of the

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[1]The Shaw Declaration, the Wicklund Declaration, the Tiller Affidavit, and the Codding Affidavit were submitted in support of the Motion to Intervene.

clinics. Id. ¶¶ 4, 12-13. Anti-choice militants have also attempted to "injure or intimidate" clinic personnel and patients by sending repeated bomb threats and throwing iron bars and rocks through the clinic windows. Id. ¶¶ 7-8.

Anti-abortion militants have forced Respondents Drs. Wicklund and Tiller to practice medicine in a climate of fear and intimidation. Since 1991, Dr. Wicklund has been stalked by extremists, who routinely surround her car and house, following her every move. Wicklund Decl. ¶¶ 6-10. Throughout her career, she has also been threatened and assaulted by anti-abortion zealots. She was once assaulted by two anti-choice zealots who leapt from a van, grabbed her and slammed her against the van, all the while screaming that she was a "baby killer." Id. ¶ 13. Particularly when attempting to reach a clinic to provide abortion services, Dr. Wicklund has had her freedom of movement regularly impeded by zealots who have blocked her driveway, her car, and her person on a constant basis. Id. ¶¶ 6-10. Moreover, the clinics where Dr. Wicklund has provided services have been attacked by anti-choice extremists and their entrances and exits have been blockaded on numerous occasions. See id. ¶¶ 12, 16.

Dr. Tiller has had similar experiences. Throughout the years his clinic, Women's Health Care Services, has experienced numerous blockades and a pipe bombing that caused approximately $75,000 in damage. Tiller Aff. ¶¶ 1, 4. In particular, during what Operation Rescue called its "Summer of Mercy" in 1991, hundreds of militants surrounded the clinic, causing the overwhelmed local police department to ask the clinic to close its doors for five days. Id. ¶ 5. Even after the clinic obtained a federal injunction to prohibit Operation Rescue from blocking the entrances and exits of the clinic, zealots continued their blockades, including the particularly horrendous tactic of encouraging

children to lie on the street in front of vehicles to prevent patients from coming to the clinic. Id. In 1993, as Dr. Tiller attempted to leave the clinic, he was shot in each arm by Rochelle "Shelley" Shannon, an anti-abortion militant. Id. ¶ 6. The same day, Ms. Shannon also assaulted a nurse at Dr. Tiller's clinic. Id.

In contrast, ALL and other Petitioners have failed to allege any facts showing that they will be harmed by enforcement of FACE. Indeed, Petitioners filed three complaints before they succeeded in asserting a justiciable claim, as the court below found that the first two complaints did "not allege that they intended any actions which would arguably invoke the statute in question." Pet. App. A26. Moreover, as the court of appeals noted, one of the Petitioners, Patricia Lohman, directs a counselling facility that is protected under FACE. Pet. App. A11.

## REASONS THE PETITION SHOULD BE DENIED

### I. THIS COURT'S COMMERCE CLAUSE DECISIONS DEMONSTRATE THAT CONGRESS HAS AUTHORITY TO ENACT FACE, PARTICULARLY BECAUSE FACE PROTECTS PROVIDERS AND PATIENTS ENGAGING IN INTERSTATE COMMERCE.

Congress correctly invoked its power under the Commerce Clause of the United States Constitution in enacting FACE. Petitioners' contention (Pet. 8-12) that the Fourth Circuit decision conflicts with United States v. Lopez, __U.S.__, 115 S. Ct. 1624 (1995), misapprehends the stark contrast between the activity regulated in the Gun-Free School Zones Act and FACE. In order to avoid unnecessary repetition of Respondent Reno's arguments,[2] the argument below will address the issue of whether the activity targeted by FACE is a valid exercise of Congress' authority because it "regulate[s] and protect[s] . . . persons . . . in interstate commerce," id. at 1629, by prohibiting interference with persons "obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1).[3]

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[2]To avoid duplication, Respondents National Abortion Federation et al. do not address ALL's meritless contentions that FACE impinges on free exercise of religion. In all respects regarding these claims or other claims not directly addressed in this brief, Respondents here adopt Respondent Reno's position.

[3]Although the focus of this brief is the second Lopez test, as the Eleventh Circuit recently held in Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995), the activity targeted by FACE also satisfies the third Lopez category of Commerce Clause regulation, because it targets "activities that substantially affect interstate commerce." 115 S. Ct. at 1630. The Eleventh Circuit drew heavily upon the reasoning of the Fourth Circuit in this case, stating that it "agree[d] with the Fourth Circuit that the

In contrast to the Gun-Free School Zones Act struck down in Lopez, which regulated an activity -- namely, education -- that is inherently local and noncommercial, FACE protects reproductive health clinics, which are commercial enterprises that purchase goods in interstate commerce, and doctors and patients, who engage in interstate commerce by traveling interstate to provide or receive reproductive health care. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964) (upholding Commerce Clause authority for Title II of the 1964 Civil Rights Act on the basis, inter alia, that motel serves interstate travelers).

Thus, FACE is analogous to United States v. Robertson, __U.S.__, 115 S. Ct. 1732 (1995), where this Court found that because an Alaskan gold mine purchased some of its supplies and equipment from out of state, hired seven out-of-state employees, and fifteen percent of its output went out of Alaska, the mine was an "enterprise . . . engaged in . . . interstate or foreign commerce." Id. These circumstances directly parallel the involvement of reproductive health care clinics in interstate commerce. As Congress determined prior to enacting FACE, "many of the patients who seek services . . . engage in interstate commerce by traveling from one state to obtain services in another," "clinic employees sometimes travel across State lines to work," and clinics purchase "medicine, medical

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Access Act [FACE] is within Congress' Commerce power, and adopt[ed] the reasoning in Part III.A. of the American Life League decision on this issue." Cheffer, 55 F.3d at 1520. The Eleventh Circuit specifically rejected as unsubstantiated the reasoning in United States v. Wilson, 880 F. Supp. 621 (E.D. Wis. 1995), appeal docketed, No. 95-1871 (7th Cir. 1995), the only case to have held that FACE is beyond Congress' Commerce Clause authority. Cheffer, 55 F.3d at 1521.

supplies, surgical instruments and other necessary medical products, often from other States." S. Rep. No. 117, 103rd Cong., 1st Sess. 31 (1993) [hereinafter "S. Rep."]. Petitioners, in relying primarily upon Lopez, completely ignore the fact that FACE satisfies the second Lopez category and confine their largely rhetorical argument to the "affecting commerce" test. See discussion supra at 5 n.3.

The connection to commerce here is even stronger than the gold mine at issue in Robertson because "the very purpose of those engaging in the conduct addressed by [FACE] is to suppress the provision of abortion services." S. Rep. at 32 (emphasis added). Indeed, anti-choice militants testified before Congress that since they have been unable to use legal channels to prevent women from obtaining abortions, it is their goal to make abortion unavailable through illegal means: "We may not get laws changed or be able to change people's minds . . . [b]ut if there is no one willing to conduct abortions, there are no abortions." Id. (citation omitted). As this Court recently noted, there can be no greater interference with interstate commerce than a concerted attempt to eliminate the availability of and access to services by and for persons engaged in interstate commerce. See Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842, 1846-48 (1991) (interstate commerce requirement satisfied by allegation of conspiracy to exclude surgeon from local market).

Moreover, congressional findings demonstrate that the nature of that interference and the need to protect doctors and patients engaging in interstate commerce was fully understood by Congress when it enacted FACE. In Lopez, this Court reaffirmed the proposition that as part of its independent evaluation under the Commerce Clause "we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on

interstate commerce." 115 S. Ct. at 1631. Unlike Lopez, where Congress made no findings regarding the effects of gun possession on interstate commerce, here Congress made extensive factual findings regarding the impact of anti-choice violence on interstate commerce and the need to protect persons in interstate commerce from this activity. FACE itself expressly invokes the Commerce Clause and the need to "promote the public safety and health." 18 U.S.C. § 248 note (1994). For example, the Conference Report, approved by the full Congress, noted the need to protect patients and employees moving in interstate commerce as well as the interstate nature of the prohibited conduct. H.R. Conf. Rep. No. 488, 103rd Cong., 2d Sess. 7 (1994). In addition, the Senate Committee recognized that "[c]linic blockades disrupt a wide range of health services [and] terrorize patients and staff." S. Rep. at 7.

Congress also relied on findings by federal courts concerning Respondents here who have been subjected to conduct designed to eliminate interstate commerce in reproductive health care. For example, the Senate Report noted a district court finding that the "avowed intent" of blockaders was to shut down Women's Health Care Clinic, the clinic Respondent Tiller operates. S. Rep. at 11 (quoting Women's Health Care Services v. Operation Rescue, 773 F. Supp. 258, 261-62 (D. Kan. 1991), rev'd on other grounds, 24 F.3d 107 (10th Cir. 1994)).

The concerted efforts of anti-choice militants to decrease abortion services have been effective: this country faces a dire shortage of physicians who are trained and willing to provide abortions. Abortion services are now available in only seventeen percent of the counties in the United States. S. Rep. at 17; Stanley K. Henshaw & Jennifer Van Vort, Abortion Services in the United States, 1987 and 1988, 22 Fam. Plan. Persp. 102, 106 (1990); see

also Stanley K. Henshaw & Jennifer Van Vort, Abortion Services in the United States, 1991 and 1992, 26 Fam. Plan. Persp. 100, 103 (1994). Not surprisingly, the Senate Committee found that "anti-abortion violence and intimidation have contributed to this shortage." S. Rep. at 17; see also David A. Grimes, Clinicians Who Provide Abortions: The Thinning Ranks, 80 Obstetrics and Gynecology 719 (1992). As in Wickard v. Filburn, 317 U.S. 111 (1942), where the primary purpose of the statute at issue was to regulate the amount of wheat in interstate commerce to avoid surpluses and shortages, Congress' primary purpose in enacting FACE was to ensure the continued availability of reproductive health services.

Under Lopez's second category, Congress may protect persons moving in interstate commerce "even though the threat may come only from intrastate activities." 115 S. Ct. at 1629. Here, however, interstate commerce is implicated to an even greater degree because a substantial portion of the threat comes from interstate activities. Relying on court opinions and testimony from law enforcement officials, as well as from the Attorney General of the United States, the Senate Committee found that those engaging in anti-abortion blockades and related conduct travel all over the country to do so. S. Rep. at 12-13.

Indeed, Congress made specific findings that the Respondents in this case participate in interstate commerce. The Senate Report noted that "[c]linic employees sometimes travel across State lines to work," id. at 31, and identified Respondent Dr. Susan Wicklund, who provides abortion services in Minnesota, Montana, North Dakota, Wisconsin, and parts of Canada. S. Rep. at 31 & n. 46. Likewise, discussing a court finding about Respondent Commonwealth Clinic, the Senate Report on FACE noted that in Bray, this Court "accepted the district court's finding that substantial

numbers of women travel interstate to seek abortion services." S. Rep. at 31; see National Organization for Women v. Operation Rescue, 726 F. Supp. 1483, 1489 (E.D. Va. 1989) (twenty to thirty percent of patients served at Respondent Commonwealth Women's Clinic came from out of state, including Maryland, D.C., Pennsylvania, Texas, West Virginia, New Jersey, New York, and Florida), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd in part on other grounds, vacated in part, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993). Similarly, the Senate cited a Kansas district court finding that "forty-four percent of the patients [at Respondent Dr. Tiller's clinic] came from out-of-State." S. Rep. at 31; Women's Health Care Services v. Operation Rescue, 773 F. Supp. at 266-67. Petitioners ignore these detailed Congressional findings regarding Respondents and the vast number of patients and providers who travel interstate to provide or obtain reproductive health services as well as the principle that courts must defer to these findings if there is a rational basis for them.

Moreover, in asserting that commerce regulation may not have even been the real legislative purpose of FACE (Pet. 10), Petitioners fail to heed that commerce regulation need not be the only, or even the primary, purpose of legislation that Congress enacts under its Commerce Clause authority. More than 30 years ago, this Court declared that "in framing Title II [prohibiting discrimination in public accommodations] Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." Heart of Atlanta Motel, 379 U.S. at 257 (1964).

Petitioners urge this Court to accept review in order to "enunciat[e] standards" (Pet. 12) to define Congress' legislative authority under the Commerce Clause. However, as Petitioners' brief itself reveals, this Court has recently done so in United States v. Lopez, by delineating three categories in which Congress may legislate, and Congress has met those standards in enacting FACE. The petition for certiorari must therefore be denied.

## II. THIS COURT'S DECISIONS MAKE CLEAR THAT CONGRESS HAS AUTHORITY TO ENACT FACE PURSUANT TO SECTION 5 OF THE FOURTEENTH AMENDMENT.

Section 5 empowers Congress "to enforce by appropriate legislation all of the provisions" of the Fourteenth Amendment. It is a "positive grant of legislative power," granting "broad powers" to Congress to protect the rights embodied in the Fourteenth Amendment. Katzenbach v. Morgan, 384 U.S. 641, 650 (1966). See also United States v. Guest, 383 U.S. 745, 784 (1966);[4] Ex parte Virginia, 100 U.S. 339, 345-46 (1879). Because childbearing decisions, including abortion, are constitutionally protected under the Fourteenth Amendment,[5] FACE is an appropriate exercise of congressional authority under Section 5, as well as the Commerce Clause.

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[4]In Guest, six justices joined at least one of two concurring opinions which reached the conclusion that "there now can be no doubt that the specific language of Section 5 empowers the Congress to enact laws punishing all conspiracies -- with or without state action -- that interfere with Fourteenth Amendment rights." 383 U.S. at 762 (Clark, J., concurring) (emphasis added); id. at 782 (Brennan, J., concurring).

[5]Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

Only one court, a district court, has ruled to the contrary in a decision that confuses judicial enforcement under the Fourteenth Amendment with Congressional power to legislate under Section 5. United States v. Wilson, 880 F. Supp. at 635. It is true, of course, that the Fourteenth Amendment protects the right to abortion only against state interference, and not against the private activity covered by FACE. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 756 (1993). However, it is equally well-settled that congressional authority under Section 5 is measured by a standard different from judicial authority, and does not depend on whether the covered activity is directly prohibited by the Fourteenth Amendment.[6] Thus, in Morgan, 384 U.S. at 644, this Court held that Section 5 authorized federal legislation prohibiting literacy tests as a prerequisite to voting, despite a previous holding in Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53-54 (1959), that such tests did not deny equal protection. See also United States v. Dep't of Corrections of Wisconsin, No. 94-C-052-C, 1995 WL 379223 (E.D. Wis. June 23, 1995) (upholding enactment of Religious Freedom Restoration Act under Section 5).

For Section 5 purposes, the critical issue is whether the legislation is "plainly adapted" to protect Fourteenth Amendment rights. Morgan, 384 U.S. at 651; see also City of Rome v. United States, 446 U.S. 156 (1980). As

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[6]"Congress' power to enforce the Fourteenth Amendment is significantly broader than that of the judiciary, because Congress may determine -- on the basis of its superior fact-finding capabilities and on the basis of the broader range of remedial options open to it as a legislative body -- that certain measures are necessary . . . to ensure that . . . federal rights are fully secured." The Freedom of Access to Clinic Entrances Act of 1993: Hearings on S. 636 Before the Senate Comm. on Labor and Human Resources, 103rd Cong., 1st Sess. 98 (1993) (testimony of Laurence H. Tribe).

the Court in Morgan noted, Section 5 must empower Congress to legislate beyond what is prohibited by the Fourteenth Amendment if the provision is to have any significance. Otherwise, because the Fourteenth Amendment is self-executing, Section 5 would only empower Congress to replicate what the judiciary was already bound to do. Morgan, 384 U.S. at 648-649.

Petitioners' claim that Section 5 does not give Congress authority to legislate over private conduct (Pet. 12-14) ignores this Court's prior precedents and misapprehends the nature of Congressional authority under Section 5. In a unanimous opinion in District of Columbia v. Carter, 409 U.S. 418 (1973), this Court reaffirmed, in dictum, the proposition that to say "[t]he Fourteenth Amendment itself 'erects no shield against merely private conduct,' . . . is not to say . . . that Congress may not proscribe purely private conduct under Section 5 of the Fourteenth Amendment." Id. at 423, n.8. In fact, this Court has upheld in several cases the application of civil rights statutes to prohibit actors from interfering with constitutional rights not protected by "any provision of the Constitution addressed to private individuals." Guest, 383 U.S. at 779 (Brennan, J., concurring). For example, 18 U.S.C. § 241 has been found to prohibit private interferences with the right to vote in a federal election, Ku Klux Klan Cases (Ex Parte Yarbrough), 110 U.S. 651 (1884); the right to discuss public affairs or petition for redress of grievances, United States v. Cruikshank, 92 U.S. 542 (1875); and the right to inform of violations of federal law, In re Quarles & Butler, 158 U.S. 532 (1895). See generally L. Tribe, American Constitutional Law §§ 5-15, at 350-52 (2d ed. 1988).

In light of Supreme Court precedent indicating that Section 5 permits legislation prohibiting private interference with Fourteenth Amendment rights, Congress' enactment of

FACE is well within the boundaries of Section 5, for it is "plainly adapted" to securing the right to abortion. As the legislative history demonstrates, the force and obstruction that FACE is intended to curb threatens to eviscerate every woman's ability to exercise her constitutional right to reproductive choice. Indeed, that is the avowed purpose of the proscribed activity. S. Rep. at 11. There could be no better example of the appropriate use of Section 5 authority, particularly since congressional findings demonstrate that state and local law enforcement are unable to adequately address this overwhelming national crisis. Id. at 19.

Moreover, Congress has the power to enact legislation when constitutional rights are threatened in a manner which undermines general principles of equality and threatens equal protection. Indeed, the Supreme Court in Morgan concluded that Congress' prohibition on literacy tests for voting not only secured the right to vote for Puerto Rican citizens, but would also be "helpful in gaining nondiscriminatory treatment in public services" and obtaining "'perfect equality.'" 384 U.S. at 652-53. Additionally, as Justice O'Connor, speaking for the majority in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989), stated, "[t]he power to enforce [the provisions of the Fourteenth Amendment] may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."

In enacting FACE, Congress relied not only on extensive legislative fact-finding to demonstrate that FACE was necessary to secure the right to reproductive choice, see supra, but also on its power to craft remedial options to fully secure equal protection for women. As the Supreme Court noted in Casey, "[t]he ability of women to participate equally in the economic and social life of the Nation has

been facilitated by their ability to control their reproductive lives." Casey, 112 S. Ct. at 2809.

As recent events tragically show, the right to abortion cannot be secured without legislation addressing the rampant violence and force directed against women and their health care providers. Thus, Section 5 provides Congress with more than adequate authority to legislate against anti-choice violence which threatens to prevent women from exercising their constitutional right to reproductive choice.

## III. THE FOURTH CIRCUIT'S DECISION CONFORMS TO THE DECISION OF EVERY COURT WHICH HAS CONSIDERED WHETHER FACE VIOLATES THE FIRST AMENDMENT.

### A. Face Is Not Impermissibly Content Or Viewpoint Based But Addresses The Severe Problem Of Anti-Choice Violence To Which Respondents Have Been Subjected.

The Fourth Circuit's decision agrees with that of all other courts, which have uniformly held that FACE does not violate the First Amendment. E.g., Woodall v. Reno, 47 F.3d 656 (4th Cir. 1995), cert. denied, 63 U.S.L.W. 3644 (June 19, 1995) (No. 94-1417); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995); United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994), appeals docketed, Nos. 95-1308, 95-1309, 95-1333, 95-1430, 95-1488, and 95-1494 (7th Cir.); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994), appeal docketed, No. 94-41194 (5th Cir.); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994). As the Fourth Circuit held, FACE is neither content or

viewpoint based nor unconstitutionally vague or overbroad. Pet. App. A13, A18.

Petitioners' argument that FACE is content based focuses on the specific intent requirement in FACE which prohibits certain activities against a person "because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1).[7] Seizing on the word "because" (Pet. 20-21), Petitioners assert that FACE is therefore content based. But, as the Fourth Circuit held (Pet. App. A13), the Constitution permits Congress selectively to protect persons exercising their rights to obtain or provide reproductive health services, just as Congress selectively protects a range of civil rights,[8] the exercise of the right to vote,[9] the right to hold office,[10] and the enjoyment of equal housing opportunities.[11] Likewise, though Title VII makes it unlawful to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1) (emphasis added), Title VII does not prohibit unjust discrimination against an employee for other reasons, such as left-handedness. State and federal antidiscrimination and civil rights laws

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[7]More generally, Petitioners object to the use of the Madsen standard (Pet. 20), even though the court of appeals correctly used the standard set in United States v. O'Brien, 391 U.S. 367 (1968). Pet. App. A14.

[8]18 U.S.C. § 245.

[9]18 U.S.C. § 594.

[10]18 U.S.C. § 372.

[11]42 U.S.C. § 3631(a).

consistently have been upheld against First Amendment challenge. See, e.g., Hishon v. King & Spalding, 467 U.S. 69 (1984) (Title VII); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (state antidiscrimination law).

Petitioners' weak attempt to conjure up a constitutional flaw fails in light of Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (violence and physical assaults not protected by First Amendment), upon which the court of appeals correctly relied in holding that FACE is not content-based. Pet. App. A12. Congress, like the state of Wisconsin, can enact laws to punish illegal conduct motivated by certain biases. Thus, Congress can address the intentional obstruction of access to reproductive health services because "this conduct is thought to inflict greater individual and societal harm," Mitchell, 113 S. Ct. at 2201, than, for example, obstructing access to businesses and schools, the examples Petitioners cite. Pet. 20. As the Fourth Circuit observed, "in passing the Access Act Congress determined that intentional interference with access to reproductive health services is more damaging to federal interests than activity that affects such access only incidentally, e.g., labor or environmental protesting." Pet. App. A13. Just as civil rights statutes may identify as especially troublesome violence triggered by a victim's race, so can FACE address the gauntlet of violence women face outside clinics providing reproductive health services.

Petitioners argue that FACE is viewpoint based while acknowledging that this infirmity is only "implicit in the text" of FACE. Pet 22. Petitioners therefore ignore the first principle of statutory construction: in interpreting a statute, "we look first to its language." Reves v. Ernst & Young, 113 S. Ct. 1163, 1169 (1993) (citations omitted). The unambiguous language of FACE applies to "whoever" engages in the prohibited conduct; therefore, as the Fourth

Circuit noted, "the viewpoint of the obstructer is irrelevant." Pet. App. A11.

In addition, FACE prohibits certain actions involving "reproductive health services." These services are broadly defined to include "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 18 U.S.C. § 248(e)(5). As the Fourth Circuit recognized (Pet. App. A11), FACE protects not only abortion clinics, but also facilities offering pregnant women alternatives to abortion, including AAA Women for Choice, Inc., the facility directed by Petitioner Patricia Lohman that offers pregnant women counsel regarding alternatives to abortion.

Moreover, Petitioners conveniently forget that most, if not all, statutes are enacted in response to specific problems. Indeed, "a statute is not rendered non-neutral simply because one ideologically defined group is more likely to engage in the proscribed conduct." Pet. App. 13. See United States v. O'Brien, 391 U.S. 367 (1968) (upholding a statutory prohibition on burning draft cards despite the fact that most violators would likely oppose the Vietnam War). For example, even though certain statutes were enacted in response to civil rights protestors, they were upheld when written in a neutral fashion. In Cameron v. Johnson, 390 U.S. 611 (1968), for instance, the Court upheld against a First Amendment challenge the Mississippi Anti-Picketing Law, which prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises," 390 U.S. 611, 612 n.1 (quoting Miss. Code Ann. § 2318.5 (1966)), even though the law had been enacted in response

to specific pickets held to protest racial voting discrimination, see id. at 620.

Because FACE is not content or viewpoint based, it should be evaluated under the three-part test set out in United States v. O'Brien, 391 U.S. 367 (1968), as the Court of Appeals concluded.[12] Pet. App. A14. To meet O'Brien's "substantial government interest" criterion, the Fourth Circuit correctly identified two groups of government interests, "protecting public health, safety and commerce [and] . . . protecting women and men from violence and threats in the exercise of their rights," which "together, or separately . . . are significant." Pet. App. A14-15. FACE also satisfies O'Brien's second prong because, as set forth above, it is "justified without reference to the message or viewpoint of anyone who might violate it." Id. at A15.

Finally, the last component of O'Brien is met because FACE "proscribes no more expressive conduct than necessary to protect safe and reliable access to reproductive health services." Id. at A16. FACE "leaves open ample alternative means for communication. In a non-violent, non-obstructive manner, protestors may still stand outside reproductive health facilities and express their anti-abortion message." Id.

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[12]Despite Petitioners' vehement opposition to this Court's opinion in Madsen v. Women's Health Center, Inc., 114 S. Ct. 2516 (1994), that decision reinforces the constitutionality of FACE. In Madsen this Court rejected plaintiffs' characterization of an injunction, which prohibited, inter alia, essentially similar conduct that FACE bans, as a content and viewpoint based restriction on speech. Moreover, this Court noted that a generally applicable statute such as FACE, as opposed to the injunction at issue in Madsen, would be held to a lower standard of constitutional review. Id. at 2524-25.

**B. Face Is Neither Overbroad Nor Vague.**

FACE is neither overbroad nor vague. Its key statutory terms are defined in the statute, are not arcane, and have been upheld in decisions of this Court and other courts as not unconstitutionally vague.

Petitioners argue that though FACE may legitimately regulate conduct, it does so in an overbroad fashion, which may implicate protected conduct. Pet. 25. A statute is unconstitutionally overbroad in a facial challenge, however, only if it is substantially overbroad, meaning that it reaches a significant amount of speech protected by the First Amendment. Houston v. Hill, 482 U.S. 451, 458 (1987). However, as the court below observed, "even though [FACE] might be applied to some protected expression, such as peaceful picketing, that picketing would be prohibited only in the most narrow and justifiable circumstances." Pet. App. A17.

A statute is unconstitutionally vague if it fails to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The provisions of FACE that Petitioners assert are vague are nearly identical to terms upheld in Cameron v. Johnson, 390 U.S. 611 (1968). The statute in Cameron prohibited picketing in a manner that "obstructs" or "unreasonably interferes with free ingress or egress" to and from courthouses. 390 U.S. at 616. The Court in that case noted that the words "obstruct" and "unreasonably interfere" are easily understood, do not require guessing, and are not susceptible to numerous interpretations.

Far from chilling free expression FACE was carefully drafted to protect First Amendment rights and therefore

Petitioners are free to continue disseminating their anti-choice message. They are not free, however, to deprive women of their constitutional rights and engage in a campaign of violence and force against women and their health care providers.

## CONCLUSION

As starkly demonstrated by the severe violence that has continued since its enactment, FACE is not a panacea. However, its prohibition of unlawful conduct is a needed response to a nationwide crisis that threatens Respondents, the public health and safety, and the reproductive liberties of all American women.

The Petition for a writ of certiorari should be denied.

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